

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE

JOHAN DANIYAN,	:	
	:	
	: Plaintiff :	Civil Action
vs.	:	
	:	
BORGATA HOTEL CASINO,	:	NO. 07-cv-02734 (JHR)(JS)
	:	
	: Defendant.:	
	:	

**BRIEF IN SUPPORT OF DEFENDANT’S MOTION IN LIMINE**  
**TO BAR ANY TESTIMONY REGARDING**  
**A WAGE LOSS CLAIM**

### On the Brief:

Nancy A. Valentino, Esquire  
0453  
COOPER LEVENSON APRIL  
NIEDELMAN & WAGENHEIM, P.A.  
1125 Atlantic Avenue - Third Floor  
Atlantic City, NJ 08401  
(609) 344-3161  
[nvalentino@cooperlevenson.com](mailto:nvalentino@cooperlevenson.com)  
Attorney for Defendant  
Marina District Development Company, LLC  
d/b/a Borgata Hotel Casino & Spa

**I. INTRODUCTION**

Plaintiff has asserted a claim for lost wages as a result of his termination from the Borgata. Defendant now moves to bar any testimony with regard to lost wages as plaintiff has failed to mitigate his damages, has subsequently applied for and been approved for Social Security Disability and does not have an economic expert.

**II. FACTS**

Plaintiff was terminated from his position as a Heavy Porter at the Borgata for failure to satisfactorily complete his probationary period. Following his termination, plaintiff failed to secure alternative employment in order to mitigate his lost wages. During his deposition plaintiff testified that he felt that he was going to be discriminated against because of his disability. (See portion of plaintiff's deposition testimony (hereinafter "Daniyan") conducted on July 17, 2008, and attached hereto as Exhibit "A", 86:23-25. Plaintiff also failed to provide any documentation and could not provide any details with respect to a search for employment. (Daniyan; 87:13-21) In addition, shortly after his termination and for reasons wholly unrelated to any injury he alleges to have sustained while employed at Borgata, plaintiff applied for and was approved for Social Security Disability. Finally, plaintiff has failed to obtain an economic expert to opine as to his alleged economic damages.

**III. LEGAL ARGUMENT**

An employee who was damaged as a result of actions by the employer has a duty to take steps to minimize the loss by making a reasonable effort to find comparable employment. If the employee, through reasonable efforts, could have found comparable employment, any amount that he could reasonably have earned by obtaining comparable employment through reasonable

efforts shall be deducted from the amount of damages awarded to the employee. *See Brown v. Stites Concrete, Inc.*, 969 F.2d 705 (8<sup>th</sup> Cir. 1992); *Kern v. Levelor Lorentzen, Inc.*, 899 F.2d 772, 781 (9<sup>th</sup> Cir. 1992). In other words, plaintiff must prove that he actively sought comparable employment in an attempt to lessen any economic damages he alleges to have suffered. In the present matter, plaintiff has failed to come forth with any evidence to show that he attempted to mitigate his damages following his termination from the Borgata. In fact, plaintiff chose to attend a program in massage therapy but never even attained a position in that line of work. As such, plaintiff should be prevented from making a claim for lost wages.

In addition, plaintiff does not have an economic expert who will testify on his behalf regarding lost wages. Federal Rule of Evidence 701 addresses opinion testimony by lay witnesses. The Rule states that if a witness is not testifying as an expert, the witness' testimony in the form of opinion or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702. Testimony regarding lost wages is clearly of scientific, technical or other specialized knowledge as it requires a complex calculation which factors in variables to determine lost wages, both past and future. An expert was not retained on plaintiff's behalf and therefore there are no witnesses qualified to testify with respect to any alleged lost wages.

Finally, shortly after his termination from Borgata, plaintiff sought and was approved for Social Security Disability based upon his alleged cognitive impairment. He has continuously received Social Security Disability since he was initially approved. Accordingly, plaintiff apparently was unable to earn the wages he claims to have lost. If plaintiff is unable to work due

to a cognitive disability, he should not be permitted to make a claim for lost wages as if he were ready, able and available to obtain employment. Plaintiffs are not permitted to be compensated from various sources simultaneously, thereby receiving a sum even greater than that which could have been earned. *See Riley v. Keenan*, 406 N.J. Super. 281, 967 A.2d 868 (App.Div. 2009)

**IV. CONCLUSION**

Plaintiff has failed to mitigate his damages. In addition he has not retained an economic expert to testify regarding any alleged lost wages. Finally, plaintiff has been approved for Social Security Disability and is not entitled to recover an amount greater than he would have otherwise earned. For these reasons plaintiff should be barred from presenting any testimony regarding alleged lost wages resulting from his termination from the Borgata.

COOPER LEVENSON APRIL NIEDELMAN  
& WAGENHEIM, P.A.

By: 

NANCY A. VALENTINO, ESQUIRE  
Attorney for Defendant, Marina District  
Development Company, LLC d/b/a Borgata  
Hotel Casino & Spa

DATED: JANUARY 3, 2011

CLAC; 475621.1

# EXHIBIT "A"

ORIGINAL

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
CASE NO. 07-02734 (JHR) (JS)

X- - - - -X

JOHAN DANIYAN,

Plaintiff,

-vs-

MARINA DISTRICT DEVELOPMENT  
COMPANY, LLC, d/b/a BORGATA  
HOTEL CASINO & SPA,

Defendants.

X- - - - -X

DEPOSITION OF: JOHAN E. DANIYAN

TAKEN BEFORE: EDIELYN CASSELBERRY, a  
Notary Public and Certified Court Reporter of  
the State of New Jersey, License No. XI01981, at  
the offices of L & L COURT REPORTING, LLC,  
1125 Atlantic Avenue, Suite 416, Atlantic City,  
New Jersey, on Thursday, July 17, 2008, commencing  
at 10:13 a.m.

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L & L COURT REPORTING, LLC  
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1125 ATLANTIC AVENUE - SUITE 416  
ATLANTIC CITY, NEW JERSEY 08401  
(609) 927-2323

Daniyan - Muskett

1 right side.

2 Q. Was that because of the back injury?

3 A. Yes.

4 Q. Did you ever see any kind of doctors or  
5 therapists or anything for your emotional upset  
6 after you were fired from Borgata?

7 A. No.

8 Q. Did you ever take any kind of medication  
9 for your emotional upset after being fired?

10 A. No.

11 Q. Let me ask you this: You said that you  
12 didn't apply for or look for other jobs for about  
13 two months, was that because of how you felt  
14 physically or how you felt emotionally?

15 A. Emotionally and physically.

16 Q. Now, where did you first start looking  
17 for work? You said you started looking at two  
18 months?

19 A. Yes.

20 Q. Where did you start looking?

21 A. After two months I tried to work at  
22 AT&T, I tried Sears, I tried many different stores,  
23 and I didn't get hired because I felt I was going  
24 to be discriminated against because of my  
25 disability because of my lower back. Because once

## Daniyan - Muskett

1 this happened, I didn't know if I was going to  
2 be -- I -- I felt that I was going to be  
3 discriminated against because of this proceeding  
4 happening right now.

5 Q. Because of your pending lawsuit?

6 A. Yes.

7 Q. Well, when you applied for a job at  
8 AT&T, what kind of job did you apply for?

9 A. Retail.

10 Q. Did you tell them that you had been  
11 terminated from Borgata?

12 A. No. I did it on-line.

13 Q. You did it on-line you said?

14 A. Yes.

15 Q. The application?

16 A. Yes, from my brother's computer.

17 Q. You didn't get that job?

18 A. No, I didn't.

19 Q. Did you go for an interview?

20 A. No. I didn't receive any kind of  
21 callbacks, so eventually I put myself in school.

22 Q. So none of the jobs you applied for ever  
23 even called you back?

24 A. No. I never received any calls since I  
25 fell and I haven't received any now because of the